22-5489

ORIGINAL

No. 22-

In the Supreme Court of the United States

UNDER SEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Virginia's crime of Malicious Wounding, Va. Code 18.2-51, is a crime of violence under the categorical approach, thereby implicating the Juvenile Justice Detention Act, when it (a) permits conviction for nonviolent means of commission, and (b) permits prosecution for acts undertaken with a reckless *mens rea*.

PARTIES

The caption of the case in this Court contains all the parties (petitioner UNDERSEAL and respondent United States).

RELATED PROCEEDINGS

Counsel is not aware of any related proceedings according to Supreme Court Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner UNDER SEAL respectfully petitions this Court for a Writ of Certiorari to review the order of the Fourth Circuit Court of Appeals.

INTRODUCTION

Petitioner is alleged to have committed federal offenses while a juvenile. Following a Juvenile Information, the Government moved to transfer Appellant for adult prosecution pursuant to the Juvenile Justice Delinquency Prevention Act (JDA). Pertinent here, the JDA provides for such a transfer if the juvenile is, among other things, alleged to have committed a crime of violence. After briefing and argument on this issue, the District Court granted the Government's motion, finding that the crimes with which Petitioner was charged were crimes of violence.

Petitioner appealed. In his appeal, Petitioner argued that Virginia's Malicious Wounding statute, under which he was charged, is manifestly not a crime of violence under this Court's categorical approach because the statute's express terms proscribe conduct of non-violent as well as violent nature. Petitioner also argued that Virginia's Malicious Wounding statute was not a crime of violence under this Court and the Fourth Circuit's precedent because

state prosecutions under the statute have not required the necessary level of *mens rea* to be a crime of violence. While this Court and the Fourth Circuit Court of Appeals have held that crimes requiring only a negligent *mens rea* are insufficient to establish a crime of violence, Virginia court have found, in practice, a recklessness *mens rea* sufficient to convict under the Malicious Wounding statute.

Contrary to this authority, the Fourth Circuit Court of Appeals denied the Petitioner's appeal and denied his motion for a rehearing *en banc*.

OPINIONS BELOW

The District Court's order of December 28, 2020, is unpublished but is reproduced at Pet. App. 1a. The Fourth Circuit Court of Appeals order denying petitioner's appeal is unpublished but reproduced at Pet. App. 17a. And the Fourth Circuit Court of Appeals order denying Petitioner's petition for rehearing en banc is unpublished but can be found at Pet. App. 24a.

JUSRISDICTION

The order of the District Court was entered on December 28, 2020, a timely appeal was filed with the Fourth Circuit Court of Appeals. On July 15, 2022, the Fourth Circuit Court of Appeals denied Petitioner's appeal,

and denied Petitioner's timely motion for rehearing *en banc* on July 26, 2022. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Juvenile Justice and Delinquency Prevention Act (in pertinent part):

A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3)), section 922(x) or section 924(b), (g), or (h) of this title, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

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18 U.S.C.A. § 5032

Virginia Malicious Wounding

If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not

maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

Va. Code § 18.2-51

STATEMENT OF THE CASE

Petitioner has been charged under the Violent Crimes in Aid of Racketeering Act, (VICAR) 18 U.S.C. § 1959 with Maiming in aid of racketeering activity in violation of 18 U.S.C. §§ 1959(a)(2), and Assault resulting in serious bodily injury in aid of racketeering activity in violation of 18 U.S.C. §§ 1959(a)(3); as well as with Malicious Wounding in violation of Code of Virginia Sec. 18.2-51. While the charges are serious, the Government's evidence suggests that Petitioner did little more than witness a brutal murder by his MS13 fellows when he was a juvenile.

Over objection, the District Court ordered Petitioner transferred under the Juvenile Justice Detention Act for criminal prosecution as an adult, finding in pertinent part that Malicious Wounding in violation of Virginia Code 18.2-51, which was charged independently and as the predicate VICAR offense, was a categorical "crime of violence."

Petitioner appealed the District Court's transfer order arguing that Petitioner had not been charged with a crime of violence. Rather Virginia's Malicious Wounding statute, properly examined under the categorical approach,

is manifestly not a crime of violence because its express terms proscribe conduct of non-violent as well as violent nature. Additionally, while this Court has held that a reckless *mens rea* is insufficient to establish a crime of violence under the categorical approach, Virginia courts have found, in practice, a recklessness *mens rea* sufficient to convict under the Malicious Wounding statute. On June 15, 2022, this court affirmed the District Court's order. On July 26, 2022, the Fourth Circuit denied the Petition for a rehearing en banc.

This Petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

Consistent Application of "crime of violence" categorical approach is a matter of paramount importance.

The Court should consider whether Virginia's Malicious Wounding, 18.2-51, is a crime of violence under application of the categorical approach because the consistent application of the categorical approach for determining crimes of violence is of paramount importance. The application under consideration is of exceptional importance when examining crimes of violence assessed against the Juvenile Justice Delinquency Prevention Act as it results in the intercession of Federal authority over

the most sacrosanct of traditional state prerogatives - the disposition of charges against its juveniles.

The Fourth Circuit wrongly applied the categorical approach to Virginia's Malicious Wounding statute.

Jurisdiction over juveniles in the federal system is governed by the Juvenile Justice and Delinquency Prevention Act (JDA), 18 U.S.C. §§ 5031 *et seq.* Under the JDA, a juvenile may not be proceeded against in federal court unless the government "certifies to the appropriate district court ... that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency ... or (3) the offense charged is a crime of violence that is a felony ... and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction." *United States v. T.M.*, 413 F.3d 420, 422-23 (4th Cir. 2005) (quoting 18 U.S.C. § 5032).

The JDA does not define "crime of violence," so courts use the definition of crime of violence set out in 18 U.S.C. § 16. *See United States v. C.A.M.*, 251 F. App'x 194, 195 (4th Cir. 2007)(citing *United States v. Doe,* 49 F.3d 859, 866 (2d Cir.1995)). That definition provides a "crime of violence" is "an offense that has as an element

the use, attempted use, or threatened use of physical force against the person or property of another."[1] 18 U.S.C. § 16(a).

To determine whether a criminal offense fits within this definition, this Court directs that a court is to examine only the statutory elements of the offense, rather than the particular facts underlying the crime; that is the court is to take a "categorical approach." *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). Thus, per this "categorical approach" a statute proscribes a "crime of violence", when an element necessarily requires the use, attempted or threatened use of physical force. A statute, on the other hand, does not categorically proscribe a crime of violence if the statute proscribes additional conduct that does not involve physical force. What this means in application is that "[w]hen a statute defines an offense in a way that allows for both violent and nonviolent means of commission, that offense is not 'categorically' a crime of violence under the force clause." *United States v. Simms*, 914 F. 3d 229, 233 (4th Cir. 2019).

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[1] In *Sessions v. Dimaya* this Court held that the residual clause of 18 U.S.C. §16(b) was unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

Turning to the pertinent Virginia statute, it is apparent that Petitioner was not charged with a "crime of violence" for the purposes of the JDA. The Virginia statute pursuant to which Appellant faces both federal charges reads:

> "If any person maliciously shoot[s], stab[s], cut[s], or wound[s] any person or **by any means** cause[s] him bodily injury, with the intent to maim, disfigure, disable, or kill…

Va. Code § 18.2-51 (emphasis added). The language of Section 18.2-51, "by any means," plainly envisions just that, any means, non violent as well as the enumerated violent means, in accomplishing the proscribed end.

Section 18.2-51 clearly permits of malicious wounding by deception. As an example, a malefactor could inveigle his victim unwittingly to touch a metal object carrying a dangerous electrical charge. Even more nefariously, a malefactor could regale a despondent acquaintance with justifications for suicide as they sat atop a tall building. The possibilities are endless, but every one of them eschews force and therefore places the Virginia statute outside the ambit of a categorical crime of violence as defined in 18 U.S.C. § 16.

Second, Virginia courts do not require sufficient *mens rea* for Malicious Wounding convictions to make it a crime

of violence under the categorical approach. This Court has held that crimes with only a negligent *mens rea* cannot qualify as a crime that has as an element the "use, attempted use, or threatened use" of physical force. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Recently, the Court confirmed its reasoning in *Leocal* and held that recklessness is also insufficient to qualify as a "violent felony" under the Armed Career Criminal Act. *Borden v. U.S.*, 141 S.Ct. 1817, 1824 (2021).

While the Malicious Wounding statute purports to require "the intent to maim, disfigure, disable, or kill", Va. Code § 18.2-51, this Court has made clear that if a state prosecutes crimes in a non-generic manner, such prosecutions are relevant in determining whether the crime is a crime of violence under the categorical approach. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193-194 (2007). In practice, Virginia courts have permitted convictions for Malicious Wounding for what can only be understood to be a recklessness *mens rea*.

In *David v. Commonwealth*, 2 Va. App. 1, 2 (Va. App. 1986), the defendant shot the sidewalk near where four people were standing. While "[t]he gun had been pointed down, not directly toward any of the four", *id.*, the bullet had ricocheted and hit one of the people. On appeal, the

defendant argued that the evidence failed to prove that he had the specific intent to maim, disfigure, disable or kill the victim. *Id.* at 3. In affirming the trial court, the Virginia Court of Appeals quoted approvingly a Maine case with similar facts:

> An "intention ... to do some violence" may be established, given appropriate facts, by evidence of a specific, subjective purpose "to do some violence." However, it is equally clear that proof of the requisite "intent" is not necessarily confined to such evidence.... Criminal "intent" may equally well flow, as a matter of law, from intentionally doing an act which has the inherent potential of doing bodily harm, and doing so in a criminally negligent manner.

Id. (*quoting State v. Anania*, 340 A.2d 207, 211 (Me. 1975)). Applying this principle, the Virginia court held that the intent-to-injure element was satisfied because "it reasonably could have been anticipated that the bullet would be deflected" into the victim. *Id.* at 5 (emphasis added). This is a classic statement of criminal negligence as a *mens rea*.

The Virginia Court of Appeals held similarly in *Commonwealth v. Shimhue*, 1998 WL 345519 (Va. Ct. App. 1998). In *Shimhue*, the victim, asleep in his bed, woke up to find that he had been shot in the leg. *Id.* at *1. There were two holes in the ceiling of bedroom, corresponding to holes in the floor of the defendant's apartment. At trial, the trial court credited defendant's

statement that he fired a gun to scare a woman out of his apartment. *Id.*

On appeal, the defendant argued that the evidence was insufficient to satisfy the element of malicious wounding that he possess the "intent to maim, disfigure, disable or kill." *Id.* Citing *David*, the Virginia Court of Appeals sustained the conviction holding that the defendant "must have known that the repeated discharge of the weapon into the floor of his upstairs apartment at a time when the building's occupants should be home could result in severe bodily harm or death. Such conduct was inherently dangerous and imposed grave risk to anyone in the vicinity. *Id.* at *2. Here, again, the Virginia Court of Appeals found criminal negligence to be sufficient to convict for Malicious Wounding.

In sum, the Fourth Circuit erred when finding that Malicious Wounding was a "crime of violence" under the categorical approach mandated by this Court because (a) Virginia's Malicious Wounding proscribes conduct of a non-violent as well as violent means, and (b)Virginia's Malicious Wounding statute permits conviction for actions taken with merely a negligent or reckless *mens rea*.

Conclusion

For these reasons, Petitioner, through undersigned counsel, respectfully requests that the Court grant Petitioner's Petition for a writ of certiorari and consider whether Virginia's crime of Malicious Wounding, Va. Code 18.2-51, is a crime of violence under the categorical approach, thereby implicating the Juvenile Justice and Delinquency Prevention Act.

Respectfully submitted,

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